Supreme Court, U.S.
FILED

(1)

No. 97 648

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

MYLES COKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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46 pp

QUESTION PRESENTED:

1. Whether a realistic appraisal of the events in this case requires a finding that Coker was deprived of his Sixth Amendment right to present a defense of his own choice and his right to effectively cross examine the government's witness regarding the conceded rampant corruption of the law enforcement officials, who were directly involved in many facets of the instant investigation and whether the court's total excision of all evidence relating to the official corruption deprived Coker of his due process right to a fair trial?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Prosecutor, United States of America; Defendants-Appellants Eric Millan, also known as "Moe", Alfred V. Bottone, Sr., also known as "Fat Al", Ralph Rivera, also known as "TJ", Jose Colon, also known as "Black Jose", Myles Coker, also known as "Mouse" and Alfred Bottone, Jr., also known as "Alfie".

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MYLES COKER,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The decision of the Court of Appeals affirming the conviction is in part unreported and is reprinted in the appendix hereto ("App.") at a.1. The reported segment of the decision is reported at 53 F.3d 507 and is reprinted in appendix at a.13.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1997. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Myles Coker was charged along with a 33 co-defendants in a multi-count indictment with participating in a major conspiracy to distribute heroin. It was the government's theory that from 1986 to 1991, the Blue Thunder Organization of which petitioner was a member distributed millions of dollars worth of heroin at retail street spots located in New York City. After Coker had pleaded guilty and during the trial of the other co-defendants, the prosecutors first informed defense counsel that government agents, who were actively involved in critical aspects of the Blue Thunder probe, had been charged with committing numerous criminal acts during the time the Blue Thunder investigation was in progress. One of these corrupt officers was Robles, who the government in its opening statement had intimated was a credible witness, and who would be providing significant testimony at trial. The government acknowledged that Robles had played a pivotal role in four undercover purchases of heroin which provided the foundation for the wiretap application in this case. The government also conceded that because of the charges pending against him, Robles would not be called as its witness at trial. Another act of potential corruption in this case was the seizure of between $50,000 and $80,000 from the trunk of a 1991 white Mitsubishi Galant sedan during the arrest of Carlos Rivera. At the time of

Rivera's arrest, this money was recovered by Agent Beck and Investigator Michael Brosnan. The government could not account for this money.[1]

Based upon this newly revealed information, the district court permitted Coker to withdraw his plea, declared a mistrial and permitted him to proceed to trial with his co-defendants. [2] Hence, although the district court was well aware that Coker had withdrawn his plea of guilty and chose to go to trial only because of the revelation of this malfeasance evidence, the court nonetheless forbade Coker from mentioning or eliciting any evidence that might suggest to the jury that government misconduct permeated this case. In return for the court's imposition of a total blackout on all aspects of the official misconduct in this case, the government agreed to dismiss those counts of the indictment that involved the corrupt officers and agreed to make no mention of any of these officers or any evidence obtained by them in their opening summation or in their case at chief. It was the government's theory that the conduct of these officers thus became collateral to any issue in the case - a theory the district court credited even though the court was aware that Coker had chosen to withdraw his plea of

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[1] Finally, the court stressed that it was concerned with the government's ability to establish a clear chain of custody over the evidence. Without further investigation, the court was unable to determine whether the vouchering process in this case was also suspect.

[2] Coker also argued that Richard Demurjian, the agent in charge of the search of his apartment, was part of a corrupt team with, among others, Agents Beck and Termini. He therefore took the position that the corruption of these officers tainted even the suppression hearing that had been held in his case.

guilty and go to trial only because of the revelation of this malfeasance evidence.

In affirming Coker's conviction, the Second Circuit merely found that the district court's restrictions on eliciting testimony concerning the corrupt activities by certain agents was not an abuse of discretion under Federal Rule of Evidence 403.

The government's case was based primarily upon the testimony of accomplice witnesses, who all decided to co-operate in hopes of obtaining leniency with respect to the imposition of their pending sentences.

REASONS FOR GRANTING THE WRIT

THE COURT'S REFUSAL TO PERMIT ANY CROSS EXAMINATION REGARDING THE CONCEDED LAW ENFORCEMENT CORRUPTION THAT PERMEATED THE BLUE THUNDER INVESTIGATION DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE OF HIS OWN CHOICE AND TO CROSS EXAMINE THE GOVERNMENT'S WITNESSES AGAINST HIM.

Perhaps no rule of constitutional dimension has been more respected by this Court than that applicable to the accused's right to present a defense in his own behalf. This fundamental right, which is the cornerstone of our criminal justice system, permits the accused to present to the trier of the facts deciding his fate his version of the crimes with which he is charged. *Faretta v. California*, 422 U.S. 806 (1974); *Chambers v. Mississippi*, 410 U.S.284, 294 (1973); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Taylor v. Illinois*, 484 U.S. 400 (1988). Equal in importance to the right

of confrontation is the defendant's Sixth Amendment right to cross examine the witnesses against him. An effective cross examination is often the only tool a defendant has at his disposal to demolish the government's case against him, *Douglas v. Alabama*, 380 U.S. 415 (1965); *Brookhart v. Janis*, 384 U.S. 1 (1966); *Pointer v. Texas*, 380 U.S. 400 (1965); *Alford v. United States*, 282 U.S. 687 (1931); *Smith v. Illinois*, 390 U.S. 129 (1966); *United States v. Miles*, 480 F.2d 1215 (2d Cir. 1973); *United States v. Turcotte*, 515 F.2d 145 (2d Cir. 1975); *United States v. Kahn*, 472 F.2d 272 (2d Cir. 1973); *United States v. Bowe*, 360 F.2d 1 (2d Cir. 1966).

Here, petitioner was not only effectively stripped of his Sixth Amendment right to present a defense of his own choice but also he was stonewalled from cross examining nearly every single government witness against him by the court's ruling. Virtually every witness in this case was tainted in some manner by the corrupt activities of the law enforcement agents. The entanglement of these witnesses in the thicket of government wrongdoing constituted a fertile source of cross examination. Petitioner withdrew his plea of guilty only because of his legitimate expectation that he would be permitted to rely on the *Brady* material that had been provided by the prosecution after he had already pleaded guilty. Therefore, petitioner was fully justified in believing that he would be permitted to raise the defense that the agents in the Blue Thunder investigation were themselves guilty of a myriad of crimes that impacted upon the integrity of the entire investigation. He thus had a valid defense at trial that had not been available to him when he pleaded guilty. He would have been able to attack the very core of the conspiracy charge - the single charge for which he was convicted. He also had substantial grounds to renew his attack on Agent Demurjian's version of the search of his apartment. Put still another way, this evidence gave Coker the smoking

gun to fatally wound the credibility of the law enforcement agents and to shoot holes in the gathering and safeguarding of all the evidence in this case including that which had been allegedly seized from Coker's apartment. Viewed from any angle, this damming evidence of law enforcement misconduct played a major role in this case and was relevant to the issues to be determined by the jury.

Nonetheless, the court refused to permit the defense to explore any of the issues relating to the widespread misconduct of law enforcement agents even though some of these same agents' activities in this case had been highlighted by the prosecution in its opening statement during the first trial. For example, the government intimated that Officer Robles was a reliable and credible witness, who would be providing significant testimony at trial. The government admitted that this same officer played a pivotal role in five undercover purchases of heroin that provided the foundation for the wiretap applications in this case. The truth was quite different. Robles and some of his brother officers were nothing more than thieves, who used their position of trust as law enforcement officials to loot and plunder their targets.

In refusing to permit the defense to explore the official corruption that permeated the instant case, the court in effect permitted the government to "sanitize" its case. The court was dead wrong. The government cannot cut off a genuine defense or curtail a defendant's right of cross examination merely by opting to eliminate some of the charges in the case or by withdrawing its dishonest witnesses. Otherwise, the government through such manipulative tactics would be able to censor evidence harmful to its case that is presented by the defense at trial. Try as they might, the government cannot avoid the reality that their investigation in this case had been compromised by the sordid acts of its investigators. There were just

too many instances during the trial when the defense not only had the right but the obligation to explore the issue of government misconduct since that matter impacted upon almost every facet of this case. Just because the government chose not to mention these astonishing events at trial does nothing to change the fact that they occurred and raised a substantial issue regarding the integrity of all the evidence that was preserved in this case.[3]

To be sure, this was not a case where simply one law enforcement agent connected with this case stepped outside the bounds of the law. Rather, this was a case wherein the entire investigation was tainted by the bad acts of multiple law enforcement officers. Both Robles and Termini independently made statements in their debriefing reports that other Task Force agents provided these officers with information culled from the wiretaps which was used in planning the thefts of money, jewelry, and drugs. These allegations alone gave the defense a good faith basis to believe that these accusations were true.

This ruling paralyzed petitioner's ability to defend himself especially against the damaging testimony of Agent Demurjian.

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[3] A graphic illustration of the colossal fallout of this blatant official misconduct was the theft of funds from Carlos Rivera's car. Rivera was considered by the government to be a major player in the Blue Thunder case. After his arrest on August 1, 1991, Agent Beck and Investigator Brosnan seized between $50,000 and $80,000 from the trunk of his white 1991 Mitsubishi Galant sedan. The government could not account for this significant sum of money. However, the evidence points directly to Agent Beck and possibly Brosnan as the officials, who stole this money. Once the government called Rivera as its witness in this case, they opened the door to a thorough cross examination, which necessarily included an examination of the money taken from his car and the failure of the government agents to voucher or safeguard these funds.

Petitioner repeatedly represented to the court that the heart of his defense lay in his claim that Agent Demurjian and the other members of the Task Force were lying about the events of August 1, 1991, and in particular, about where, when and how Demurjian found drugs, money, weapons, and the documents in the apartment where petitioner was arrested. Petitioner wanted to show that these officers were part of this overall corrupt conspiracy. Specifically, petitioner wanted to cross examine Agent Demurjian at trial regarding whether his consent to search was a fabrication and whether the drugs were really in plain view. The court again stymied this cross examination and directed counsel not to pursue this line of questioning even though petitioner clearly had a good faith basis for asking questions of this nature (1290). Agent Demurjian was intimately involved in critical aspects of the Blue Thunder investigation. He had worked in this investigation with Robles, Beck, Termini, and Sergeant Johnston. He was involved in the surveillance and arrest of Carlos Rivera when Rivera's money had been stolen from the trunk of his car. He was accused in civil suits along with Beck and Termini of fabricating consents to search and perjury.

Additionally, petitioner was barred from exploring the chain of custody of the documents and other evidence that had been seized from his apartment during the search despite the fact that these items might well have been affected by the issues of corruption and Demurjian's connection to it. Even in the absence of the corruption link, the jury obviously had problems with Demurjian's credibility. During their deliberations, it was the testimony of this Agent that the jury repeatedly requested to hear. When reaching its verdict, the jury apparently rejected Demurjian's claim that he found three firearms during the same search that had recovered all the other items. The jury could not reach a verdict regarding the firearms

or the drug possession counts. If petitioner had been permitted to cross examine this vital witness regarding his participation with his brethren officers in their corrupt activities, the result of this trial with respect to petitioner might have had a dramatically different verdict.

Another troubling issue in this case focused on the defense claims that the Agents submitted altered reports during this investigation. The defense had a sound basis for this belief. Beck had informed the prosecutors that a DEA-6 report that he had submitted in this case had been altered when Sergeant Johnston told him that the report was not suitable for court and that he was going to give it to Agent Dongilli to correct. According to Beck, this report had been changed. In seeking to preclude the defense from cross examining Dongilli regarding this grave allegation, the government charged that Beck was a liar (A.357-358, 360-361, 479, 481, 483). It is curious that the government eagerly accepted the assertions of Beck, Termini, and Robles as true when they insisted that they committed no crimes encompassing the Millan investigation. Yet, they denounce these same agents as liars whenever their allegations are in conflict with their position. This Alice in Wonderland logic by the government cannot be reconciled. Further, the court at one point agreed with the defense, when finding, "[A]s Dongilli is a key Government witness, and as the corruption investigation files involving Beck's allegations bear on both Dongilli and Johnston's credibility, the Court finds that disclosure of those investigative reports relating to the alleged tampering with the DEA-6 is warranted, and that both Dongilli and Johnston may be cross examined regarding Beck's allegations" (A.408)(emphasis supplied). Why the court changed its mind regarding the relevancy of this information at trial to this day remains a mystery. This ruling again undermined petitioner's defense. As stated, the government's

case in large part depended on the items that were recovered from petitioner's apartment. Petitioner never deviated from his claim that Demurjian was lying regarding the results of the apartment search and that the evidence he claimed was recovered was not there. Only D'Erchia, the missing witness, completed a DEA-6 report. Coincidentally, this same report was not signed by D'Erchia (SA-1). Instead, Agent Dongilli signed the report in his behalf, which was subsequently approved by Sergeant Johnston. These were the same agents who Beck had claimed had altered his DEA-6 report. Petitioner therefore had a good faith basis to question these agents whether the DEA-6 report concerning the search of his apartment had been similarly altered by them to conform to their theory of the case. Yet, the court continued to stymie any cross examination that touched on this sensitive topic.

In sum, the court's blanket exclusionary order gave the jury the false impression that everything was done in a pristine manner in this investigation; that all procedures were correctly followed; that evidence was properly vouchered; that the official reports were accurate in all respects; that the cooperating witnesses had no bias in favor of the government; and that its agents were scrupulously honest. This view was altogether deceptive. Petitioner had every right to disabuse the jury of this unsullied picture of this investigation.

Further, it is also puzzling that the trial court in granting petitioner's application to vacate his plea of guilty because of the revelation of the police corruption specifically found, "[T]he corruption investigation had already turned up evidence making incredible the Government's assertions regarding Robles in its opening statement, brought into question the integrity of the undercover buys upon which the Blue Thunder case hinged, and eliminated one of the Government's key witnesses" (A.331). The fact that the Government subsequently decided to

excise any mention of the crooked officers (Robles, Beck, or Termini) and even more powerful, its decision to excise three counts of the indictment (the counts that included Robles' undercover purchases of heroin from the Blue Thunder organization) did not eradicate the issue of official corruption from this case or change the import of the trial court's initial findings. This issue cannot magically disappear, as the Government would like, merely because of its manipulation of the evidence. That was essentially the crux of the Government's response to the Court of Appeals. If the Government blinds itself to the existing corruption when prosecuting a particular case and fails to make any reference to it, although corruption pervades the case, then the defense must be bound by the Government's strategy.

Further, it is plain that the government's case hinged primarily on the testimony of Agent Demurjian, who had seized the bulk of the evidence from petitioner's apartment. It was therefore vital that petitioner be permitted to cross examine this witness regarding his knowledge and/or participation in the corrupt acts of his fellow officers. The jury obviously had trouble accepting the veracity of Demurjian's testimony. This jury rejected his testimony entirely concerning his seizure of the firearms and the heroin from petitioner's apartment. It also appears that the jurors violently disagreed over petitioner's culpability in this case and even exchanged physical blows with one another. This occurred almost immediately after they requested the court to read portions of Demurjian's testimony to them. It only stands to reason that if petitioner had been permitted to cross examine this witness concerning the rampant corruption that occurred during the Blue Thunder investigation, the jury would have rejected all his testimony. Absence the evidence seized from his apartment, petitioner stood a good a chance at acquittal since the remaining evidence against him

was at least commensurate with the evidence adduced by the government against other defendants in this case, who were acquitted. He therefore had a good faith basis to attack the other evidence that was introduced against him on the conspiracy charge, such as the Grand Street narcotic records, on the same grounds.

Contrary to the government's representations in the below, we are not dealing with reasonable limitations on the cross examination of a witness concerning a particular subject that is within the sound discretion of the trial court. Rather, we are confronted with a total **blackout** or **censorship** of a vital issue in this case -- and that is the issue of law enforcement corruption especially when the defense had a conceded good faith basis for making extensive inquiry regarding the official corruption that infiltrated this case.

In *Bracy v. Gramley*, _ U.S. _, 1997 U.S. Lexis 3548 (decided 6/9/97), this Court recently dealt with a case that encompassed the thorny issue of judicial corruption. The Court held that given the history of the case, the petitioner had shown good cause to believe that the Judge's discretionary rulings in his case may have been influenced by a desire on his part to allay suspicion of his pattern of corruption and dishonesty with respect to other cases. The Court concluded that the petitioner was therefore entitled to discovery on his claim of actual judicial bias in his matter. So, too, in this case, petitioner has made more than a prima facie showing of law enforcement corruption. In line with this Court's decision in *Bracy*, all evidence relating to this issue should not have been suppressed by the district court. Rather, it formed a vital core of petitioner's defense and should have been presented to the jury that could have then intelligently determined the critical issue as to whether the integrity of this prosecution was so compromised so as to render the testimony of the law

enforcement officials concerning the seizure and vouchering of evidence so untrustworthy, thereby warranting petitioner's acquittal.

Because government misconduct played a major role in this case, the court's total exclusion of petitioner's defense premised on this issue and its refusal to permit any cross examination on this subject constituted such mammoth errors that this Court should now grant petitioner's application for a writ of certiorari so that this issue can be finally resolved especially in light of its recent *Bracy* decision.

CONCLUSION

This Court should grant certiorari to enforce defendants' Sixth Amendment rights to defend themselves even though that defense encompasses the issue of law enforcement corruption.

September 22, 1997

Respectfully submitted,

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JULIA PAMELA HEIT
Of *Counsel*

APPENDICES

APPENDICES
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of April, one thousand nine hundred and ninety-seven.

PRESENT: HONORABLE WILFRED FEINBERG,
HONORABLE FRANK X. ALTIMARI,
HONORABLE FRED I. PARKER,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 94-1516(L)

HERIBERTO ROSARIO, also known as "Eddie"; MIGUEL KERCADO, also known as "Mickey"; CARLOS RIVERA, also known as "LL"; VINCENT BASCIANO, also known as "Vinnie"; ALBERT BISCAGLIO, also known as "XYZ"; EUSTROGIO MATUTE, also known as "panama"; WILLIAM MENDOZA, also known as "Willie"; MARCEL DELGADO JR., also known as Papo"; PEDROD GONZALEZ, also known as "Klepper Duche"; CARLOS QUINONES, also known as "charlie Lie"; JUILO SALAS, also known as "Sal"; ANGEL ALVARADO; RONALD RICHARDSON; ALEX PACHECO, also known as "Cool E"; DAVID DELVALLE; HECTOR SUAREZ; PORFIRIO ORTIZ; NOEL MELENDEZ; GREGORY WILLIAMS; MILDRED HERNANDEZ; SONIA RIVERA; JOSE KERCADO; RAIMUNDO HURDLE; FRANK COLON; CHARLES COLON; GRISELDA COLON; WILLIAM LOPEZ; JOSE AGOSTO; CARMEN MENDOZA; MIGUEL RODRIQUEZ; SAMANTHA TORRES; LARRY WEINSTEIN,

Defendants,

ERIC MILLAM, also known as "Moe"; ALFRED V. BOTTONE, SR., also known as "Fat Al"; RALPH RIVERA, also known as "TJ"; MYLES COKER, also known as "Mouse"; JOSE COLON, also known as "Black Jose"; ALFRED BOTTONE, JR., also known as "Alfie",

Defendant-Appellants.

APPEARING FOR APPELLANT: David I. Schoen,
(Eric Millan) New York, NY

APPEARING FOR APPELLANT: Maurice H.
Alfred V. Bottone, Sr. Sercarz, New York, NY

APPEARING FOR APPELLANT: John M. Apicella
(Ralph Rivera) Brooklyn, NY

APPEARING FOR APPELLANT: Julia Heit
(Myles Coker) New York, NY

APPEARING FOR APPELLANT: Roger J. Schwartz
(Jose Colon) New York, NY

APPEARING FOR APPELLANT: Mark M. Baker,
(Alfred Bottone, Jr.) Brafman, Gilbert and Ross, P.C.,
New York, NY

APPEARING FOR APPELLEE:
Dietrich L. Snell, Assistant United States Attorney
Southern District of New York, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Shirley Wohl Kram, Judge).

This cause came to be heard on the transcript of record from the United States District Court for the Southern District

of new York and was argued by counsel for appellants and appellee.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT THE JUDGMENTS OF CONVICTION OF THE DISTRICT COURT ARE AFFIRMED WITH RESPECT TO THE FOLLOWING ISSUES.

Appellants appeal from judgments of conviction of the Untied States District Court for the Southern District of new York (Shirley Wohl Kram, Judge, entered on several dates between September 21, 1994 and December 27, 1994.

With respect to the double jeopardy claims raised by appellants Millan, Bottone Sr., Rivera, and Bottone Jr., this Court has already ruled on a prior double jeopardy appeal stemming from the declaration of two individual mistrials relating to these four appellants, United States v. Millan, 17 F.3d 14 (2d Cir. 1994), and from the settlement of certain civil forfeiture proceedings prior to trial by Bottone Sr. and Bottone Jr., United States v. Millan, 2 F.3d 17 (2d Cir. 1993). We find no reason to alter our earlier rulings, which we reaffirm. Rivera adopts the arguments made by made by the Bottones on this point; therefore, we reject his claim for the same reasons. With regard to the double jeopardy claims arising from the civil forfeitures, we further note that these claims are foreclosed by the Supreme Court's recent decision, United States v. Ursery, 116 S.Ct. 2135 (1966).

We also reject Rivera's double jeopardy claim arising from the criminal forfeitures imposed under 21 U.S.C. § 853 (a), because such forfeitures are considered as part of the punishment for violation of the drug laws. See United States v. Petty, 80 F.3d 1384, 1387 n.1 (9th Cir. 1996); cf. United States v.Mohammed, 27 F.3d 815, 819 (2d Cir. 1994) ("it is well settled that the legislature may impose multiple punish-

ments for the same conduct without violating the Double Jeopardy Clause, so long as it expresses its intent to do so clearly.").

With respect to the district court's rulings that precluded appellants from questioning about alleged corrupt activities by certain agents, we find that the court's determination under Federal Rule of Evidence 403 were not any abuse of discretion.

With respect to appellant Millan's contention that the briefcase seized from his car at the time of his arrest was unlawfully searched, and that the evidence found in the briefcase and the fruits therefrom should have been suppressed, we find no error in the district court's conclusion that the challenged search was proper under the "automobile exception" to the Fourth Amendment's warrant requirement, and that the search was also lawful as an inventory search.

With respect to appellant Coker's claim that the district court committed error in declining to grant his request for a continuance of his pre-trial suppression hearing so that he could call a law enforcement witness who was then stationed out of the country, we find that the district court properly acted within its discretion in declining to grant the continuance.

With respect to the excluded tape recordings that appellant Bottone, Jr. offered in his defense case under Federal Rule of Evidence 106, we find that the district court's determination that appellant offered no theory as to how the statements he sought to have admitted either provided context to, or completed or clarified statements on other inculpatory tapes, was not an abuse of discretion. Furthermore, regarding appellant's other contentions relating to this evidence, we find that the court acted properly in determining that the substance of the tapes does not qualify as state of mind evidence, and in otherwise excluding this irrelevant evidence.

With respect to the district court's preclusion of cross examination by appellant Bottone Sr. concerning a rape charge lodged against an accomplice-witness, which testimony was sought to demonstrate bias, we find that the district court's discretion was properly exercised.

Appellant Bottone Jr. contends that the evidence presented at trial constructively amended the indictment or caused a prejudicial variance. We find that the district court acted properly when it ruled that whether facts of separate transactions and/or different participants constituted a single conspiracy was a question of fact for the jury, and then gave a comprehensive charge to the jury concerning the law of single versus multiple conspiracies.

With respect to appellant Rivera's challenge of the sufficiency of the evidence relating to the substantive offenses of possession with intent to distribute heroin, we find that the evidence was sufficient to support a conviction under the theory of Pinkerton v. United States, 328 U.S. 640 (1946), and that the Pinkerton theory was properly charged by the court.

With respect to the contention by the Bottone appellants that the jury's request to replay certain audio recordings was ambiguous, we find that the district court acted within its discretion when it disagreed that further clarification was necessary. The trial judge gave the jury's note a reasonable interpretation, made after the court had already asked the jury for further specification.

With respect to appellant Bottone Sr.'s argument that the district court erred when it denied his motion for a mistrial after an altercation between two jurors, we find that the district court did not abuse its discretion in determining that they jury could continue to deliberate fairly, and we further find that the court took substantial steps to assure itself before making this determination.

With respect to Bottone Jr.'s argument that the district court improperly refused to hold a hearing to determine whether he had been competent to stand trial, and to determine his competence to be sentenced, we affirm the district court's rulings. Both applications were made after trial; therefore, the court denied the application insofar as it sought to raise an issue about appellant's competence during trial. Based on the evidence provided by a pre-sentence evaluation ordered by the court, the court's own observations, and defense counsel's failure to raise any concern about appellant's competence, the district court issued an opinion rejecting appellant's request for a hearing to determine his competence to be sentenced, finding that there was no reasonable cause to believe that he was incompetent to proceed to sentencing. A district court must conduct an evidentiary hearing to determine the competency of a defendant only if there is reasonable cause to believe that the defendant is incompetent within the meaning of Title 18 of the United States Code, Section 4241 (a). United States v. Kirsh, 54 F.3d 1062, 1072, cert. denied, 116 S. Ct. 330 (1995). In making this determination, the court must consider the objective facts of which it has knowledge. Nicks v. United States, 955 F.2d 161, 169 (2d Cir. 1992). Determination whether there is reasonable cause to believe that the defendant may be incompetent rests initially in the discretion of the district court. United States v. Vamos, 797 F.2d 1146, 1150 (2d Cir. 1986). Further, the district court's view of the defendant's competency based on its observations at trial is entitled to deference. Kirsh, 54 F.3d at 1070. Thus, we affirm the district court's rulings.

With respect to appellant Rivera's ineffective assistance of counsel claim, stemming from the reappointment of counsel who was the fourth, and then again the sixth and final in a succession of counsel who were appointed and rejected by

appellant, we find that the district court did not abuse its discretion in reappointing counsel. The court found appellant's tactics to be dilatory. The court also noted reappointed counsel's familiarity with the case, and stated that counsel had not been removed for cause in the first instance. Nor did the district court err in refusing to grant a mistrial or a severance after appellant attacked his fifth counsel with a pen as the jury was leaving the court room. The court's determination that the jury had already cleared the room was appropriate. The court also did not abuse its discretion in limiting the continuance granted to reappointed counsel before resuming trial. It is well settled that a trial court has broad discretion to determine whether to grant a continuance of a trial, or the extent of any continuance which may be necessary. See, e.g., Morris V. Slappy, 461 U.S. 1, 11-12 (1983). The court was concerned about delay, and both the court and the government made accommodations for reappointed counsel as much as possible, including restructuring the appearance of the witness and appointing counsel number five as standby counsel. As to counsel's effectiveness, we find that appellant did not demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and did not affirmatively prove prejudice from the alleged derelictions in counsel's performance, as required under Strickland v. Washington, 466 U.S. 668 (1984). Finally, with respect to appellant's allegations that both reappointed counsel and standby counsel had conflicts of interest, we find that the district court properly fulfilled its investigation obligations under United States v. Santini, 85 F.3d 9, 13 (2d Cir. 1996).

With respect to Millan's right to counsel of choice and ineffective assistance of counsel claims, we find that the claims are meritless on all grounds. Concerning the appellant's argument that the government's failure to timely bring the

imminent indictment of appellant's counsel to the attention of the court deprived him of his right to have retained counsel of his choice, we find that appellant was not prejudiced because the first trial ended in a mistrial shortly after appellant was severed. Furthermore, appellant made no showing that if he had known earlier that his counsel was facing indictment, he would have been in a better position to retain new counsel, and even admits that he could not afford to without the return of certain forfeited funds. Regarding appellant's claims that he was effectively denied counsel of his choice by the government's failure to timely notify him of his counsel's conflict, and that this right to counsel was further violated by the district court's denial of a hearing pursuant to United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) to consider the propriety of the government's forfeiture of certain assets, it is settled law that though a defendant has a right to counsel of his choice, he cannot insist on being represented by counsel who has a conflict of interest. Wheat v. United States, 486 U.S. 153, 162 (1988). Millan has not shown that, assuming prompt disclosure by the government, he would have had sufficient assets to retain other counsel. As for the request for a Monsanto hearing, the district court properly found that the subject assets had long since been forfeited by the time appellant filed his motion. Once the administrative forfeiture is completed, and a Declaration of Forfeiture is issued with respect to seized assets, the forfeiture is final, and a district court has not power to review the merits of the forfeiture. 19 U.S.C. § 1609/ We also find that appellant did not demonstrated ineffective assistance of counsel under the Strickland test.

With respect to appellants' complaints that in various respects their sentencing proceedings were improper,we find that the district court's rulings were not an abuse of discretion.

In all rulings, the court made it clear that it was relying on the Pre-Sentence Reports prepared by the Probation Department; and in all instances, the district court made adequate findings of fact to permit judicial review. In United States v. Thompson, 76 F.3d 442, 456 (2d Cir. 1996), this Court recently made clear that it is sufficient if the court indicates, either at the sentencing hearing or in the written judgment, that it is adopting the recommendations in the Pre-Sentence Report. Moreover, it is well-settled that facts relating to sentencing need only established by a preponderance of the evidence. See, e.g., United States v. Gigante, 94 F.3d 53 (2d Cir. 1996); United States v. Conception, 983 F.2d 369, 288 (2d Cir. 1992). Here, the evidence of conspiring to distribute more that 300 kilograms of heroin, which determines the defendants' base offense levels, is compelling. Accordingly, we affirm the district court's rulings concerning the sentencing issues in all respects.

With respect to appellant Rivera's argument that the district court's order forfeiting his substitute assets denied him his alleged right to a hearing so that he may contest that the seized assets were drug-tainted,we find that there is no requirement under 21 U.S.C. §853 (p) that the government demonstrate the substitute assets are traceable to criminally activity. The value of the assets became forfeiture count. The purpose of § 853(p) is to substitute non-tainted assets for tainted assets that are not able to be located for forfeiture. The criminal forfeiture order entered against appellant under § 853 was an in personam forfeiture, reaching any of appellant's assets, including criminal proceeds under § 853 (a), or if those assets were not available, any other assets belong to appellant of equal value under § 853 (p). Therefore, the district court properly determined that appellant was not entitled to a hearing on an issue the statute does not present.

Remaining issues not addressed in this summary order are covered by an opinion also filed today.

WILFRED FEINBERG, U.S.C.J.

FRANK X. ALTIMARI U.S.C.J.

FRED I. PARKER, U.S.C.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 9, 29,17, 11 August Term, 1996
(Argued: December 9, 1996 Decided: April 14, 1997)
Docket Nos. 94-1516, 94-1592, 94-1604, 94-1606, 94-1614, 95-1015, 95-1531 & 95-1687

UNITED STATES OF AMERICA,

Appellee,

v.

HERIBERTO ROSARIO, also known as "Eddie"; MIGUEL KERCADO, also known as "Mickey"; CARLOS RIVERA, also known as "LL"; VINCENT BASCIANO, also known as "Vinnie"; ALBERT BISCAGLIO, also known as "XYZ"; EUSTROGIO MATUTE, also known as "panama"; WILLIAM MENDOZA, also known as "Willie"; MARCEL DELGADO JR., also known as Papo"; PEDROD GONZALEZ, also known as "Klepper Duche"; CARLOS QUINONES, also known as "charlie Lie"; JUILO SALAS, also known as "Sal"; ANGEL ALVARADO; RONALD RICHARDSON; ALEX PACHECO, also known as "Cool E"; DAVID DELVALLE; HECTOR SUAREZ; PORFIRIO ORTIZ; NOEL MELENDEZ; GREGORY WILLIAMS; MILDRED HERNANDEZ; SONIA RIVERA; JOSE KERCADO; RAIMUNDO HURDLE; FRANK COLON; CHARLES COLON; GRISELDA COLON; WILLIAM LOPEZ; JOSE AGOSTO; CARMEN MENDOZA; MIGUEL RODRIQUEZ; SAMANTHA TORRES; LARRY WEINSTEIN,

Defendants.

ERIC MILLAM, also known as "Moe"; ALFRED V. BOTTONE, SR., also known as "Fat Al"; RALPH RIVERA,

also known as "TJ"; MYLES COKER, also known as "Mouse"; JOSE COLON, also known as "Black Jose"; ALFRED BOTTONE, JR., also known as "Alfie",

Defendant-Appellants.

Before: FEINBERG, ALTIMARI, and PARKER, CIRCUIT JUDGMENTS.

Appeals from multiple judgments of conviction entered by the United States District Court for the Southern District of New York (Shirley Wohl Kram, Judge) on various drug trafficking and gun possession counts related to the operation of a heroin drug conspiracy.

Affirmed in part. Vacated and remanded in part.

David I. Schoen, New York, NY for Defendant-Appellant Eric Millan.

Maurice H. Sercarz, New York, for Defendant-Appellant Alfred V. Bottone, Sr.

John M. Apicella, Brooklyn, NY, for Defendant-Appellant Ralph Rivera.

Julia Heit, New York, NY, for Defendant-Appellant Myles Coker.

Mark M. Baker, New York, NY (Benjamin Brafman, Mindy Leifer, Brafman, Gilbert and Ross, P.C., New York, NY, Michael H. Handwerker, Jacqueline Gayner, Handwerker, Honschke, Marchelos And Gayner, New York, NY, Brenda Grantland, Mill Valley, CA, of counsel) for Defendant-Appellant Alfred Bottone, Jr.

Dietrich L. Snell, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney, Southern District of New York, Dietrich L. Snell, Roland G. Riopelle, Sharon Cohen Levin, Martine M. Beamon, Ira M. Feinberg, Guy Petrillo, Assistant United States Attorneys, New York, NY, of counsel), for Appellee.

(Jeffrey Steinborn, Steinborn I Associates, Seattle Wa, on the brief), for Amicus Curiae Forfeiture Endangers American Rights Foundation.

PARKER, Circuit Judge:

Appellants appeal from judgments of conviction of the United States District Court for the Southern District of New York (Shirley Wohl Kram, Judge), entered on several dates between September 21, 1994 and December 27, 1994.

I. BACKGROUND

Appellants were convicted for their participating in a large-scale heroin drug conspiracy ring operated in the greater New York City area and in outlying counties of New York and New Jersey under the brand name "Blue Thunder." The background facts are set forth in our precious decisions in this case, and in the published decisions of the district court, familiarity with which is assumed. We recount only the facts relevant to the present appeal. In addition, certain issues raised on appeal have been addressed by a separate summary order, filed concurrent herewith, and will not be discussed in this opinion.

II. DISCUSSION

A. Admission of a Redacted Excerpt from a Defendant's Proffer Statement in Favor of a Co-defendant

The first issue we are called upon to determine is whether redacted excerpts from a proffer of one of the defendants were properly admitted. Appellant Alfred Bottone Sr. argues that admission of the statements was precluded under Rule 11 (e) (6) (D) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence because they were made in the course of plea negotiations. We hold that the district court's ruling to admit the excerpts was appropriate.

Bottone Sr. Regularly shipped bulk quantities of heroin for consignment sale to a variety of retail distribution organizations involved in the conspiracy. Prior to trial, Bottone Sr. entered into a proffer agreement with the government in which the government agreed not to offer any statements made by Bottone Sr. in its case-in-chief.

During the proffer interview, Bottone Sr. admitted his involvement in narcotics trafficking. In the redacted statements at issue, Bottone Sr. claimed that co-defendant Vincent Basciano was not involved in heroin trafficking, and that certain tape-recorded conversations admitted in evidence, obtained pursuant to a Title III investigation, concerned discussions about an illegal gambling business in which Bottone Sr. and Basciano were involved -- not heroin transactions.

In the course of the trial, after in camera inspection by the court, Basciano was able to obtain the redacted statements as potentially exculpatory Brady material. He offered them into evidence pursuant to Rule 806 of the Federal Rules of

Evidence.[7] Rule 806 permits introduction of out-of-court statements of a co-conspirator for the purpose of impeaching that co-conspirator's statements admitted into evidence under Rule 801 (d)(2) (E) of the Federal Rules of Evidence. Rule 801 (d) (2) (E) provides for the admission of statements by a co-conspirator, made during the course and in furtherance of a conspiracy. Basciano argued that Bottone Sr.'s proffer statement, stating that Basciano was in the gambling business and had nothing to do with the heroin business, impeached the statements on audiotape which had earlier been admitted as statements by a co-conspirator during the course and in furtherance of a conspiracy, including a taped statement in which Bottone Sr. allegedly discussed heroin trafficking matters with Basciano.

Bottone Sr. opposed Basciano's motion on the ground that the statements were inadmissible under Federal Rule of Criminal Procedure 11 (e) (6) (D, Federal Rule of Evidence 410, and this Court's holding in United States v. Serna, 799 F.2d 842 (2d Cir. 1986). Rule 410, like Rule 11, provides that statements made in course of plea discussions are inadmissible against the defendant participating in the plea discussion.1 The government agreed with that argument, but contested admission of the redacted proffer primarily on the ground that the

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[7] He had earlier offered them under Rule 804 (B)(3) (as statements against penal interest of Bottone Sr.) but failed to get them admitted because the court ruled that Rule 11 (e) (6) (D) precluded any testimony concerning the circumstances of the proffer. Bottone Sr. argues that this earlier ruling somehow prevented the later admission of the statements, or shows that the admission was in error, We reject that argument. The fact that the court may have been mistaken in its earlier ruling, or simply saw things differently later in the trial (there is some uncertainty as to the precise extent of the earlier ruling), has no impact whatsoever on the later decision to admit the statements.

statements did not have impeachment value because they were not inconsistent with any statement admitted in evidence through the tape recordings. The district court rejected these arguments, and the statements were admitted.

Rule 806 simply makes an otherwise hearsay statement admissible when the declarant (Coconspirator) has not taken the stand, but his statements have nevertheless come into evidence as a statement in furtherance of the conspiracy. Rule 806 does not overcome the Rule 410 objection if the statements being offered were obtained in a proffer session and they are being offered against the person who made the proffer.

The question which is raised here is whether the redacted proffer statements were being offered against Bottone Sr. or in favor of Basciano. In Serna, this Court addressed an argument that a statement was offered only for a limited purpose in favor of a co-defendant, and not against Serna. We rejected that argument, stating that "there [was] a strong likelihood that the jury would have considered [the proffered statement] as evidence against Serna . . . [and that a] limiting instruction would haver been ineffective to protect Serna from the devastating impact of the statement that was tantamount to a confession." 799 F.2d at 849 (citing Bruton v. United States, 391 U.S. 123, 129 (1968).

We distinguish this case from Serna. In response to questioning during plea negotiations about the involvement of a co-defendant in narcotics trafficking activity, Serna made a statement to an agent to the effect, "you have the wrong person." 799 F.2d at 848. In the instant case, the following testimony was elicited at trial from a Special Agent of the Drug Enforcement Administration by Basciano in his defense case:

> In substance Alfred Bottone, Sr. stated that following: "Bottone claimed that Vincent Basciano had nothing to do with the heroin business and that all the intercepted

> telephone conversation [involving] Basciano pertain to Basciano's gambling business. Bottone further claimed that Basciano's gambling business was a bad package and that he was advising Basciano in the intercepted conversations. Bottone denied that he was working for Basciano. He also claimed that he did not need anyone's approval to open up a numbers spot anywhere in New York City."

Although it was established that the statements were made about five months after Bottone Sr. was arrested, the jury was not informed of the fact that the statements were made at a proffer session. Also, the court instructed the jury not to consider either the substance of the statements or the circumstances in which they were made in evaluating the guilt or innocence of Bottone Sr. The district court found that there was no danger that the jury would consider this evidence against Bottone Sr., and on this basis, distinguished this Court's decision in Serna.[8] For this same reason, among others, the court also rejected defendant's request for severance on the basis of antagonistic defenses. We find both hose rulings proper.

In Serna, this Court considered Serna's statement as a confession of guilty, because saying that the authorities had the "wrong" man necessarily implied that Serna knew who the 'right" man was --that is, who was involved in the narcotics

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[8] The district court also appeared to be persuaded by Basciano's citation to this Court's decision in United States v. Myerson, 18 F.3d 153 (2d Cir. 1994), which had been decided only ten days before. Myerson does supply support for the admission of out-of-court statements of a com-conspirator for impeachment purposes; however, the statements in that case did not derive from a proffer session.l Accordingly, Serna, not Myerson, is the controlling authority here.

deal with him. In contrast, Bottone Sr.'s statement that he and Basciano were involved in gambling, not in the heroin business, did not imply that Bottone Sr.'s knowledge derives from his own involvement in the heroin business. The explanation which was offered to support the statement that Basciano was not involved in the heroin business is that both Bottone Sr. and Basciano were involved in the gambling business rather than the drug business --an assertion that Bottone Sr. maintained throughout trial as an integral part of his defense.

Furthermore, in that respect, Bottone Sr.'s and Basciano's defenses were not antagonistic, but consistent, and Bottone Sr.'s request for severance was properly denied as he failed to demonstrate the requisite prejudice to outweigh the trial court's considerations to deny the severance request under Rule 14 of the Federal Rules of Criminal Procedure. See United States v. Lanza, 790 F.2d 1015, 1019 (2d Cir. 1986); United States v. Figueroa, 618 F.2d 934, 944-45 (2d Cir. 1980); United States v. Burke, 700 F.2d 70, 83 (2d Cir. 1983). The district court had weighty reasons not to grant the severance near the end of the six-month trial which had already suffered one mistrial. The court properly determined that there was not "a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 506 U.S. 534, 539 (1993).

We conclude that the facts in this case are distinguishable from those of Serna, and that the court's determination that the evidence would not be considered against Bottone Sr. was proper. In the case at bar, the inference is not necessarily, or even likely, drawn that Bottone Sr., confessed his guilt when he made the statements that were admitted. Accordingly, we affirm the district court's decision

b. Defendant's Due Process Right to be Present During Post Verdict Questioning of a Juror Concerning Alleged Bias.

The next issue we decide is whether a defendant has a due process right to be present during the questioning of a juror, after a verdict has been rendered but before sentence is imposed, for the purpose of challenging the juror's alleged basis. We also address whether the trial court met its full duty to inquire into the fitness of a juror.

Appellant Ralph Rivera argues that his due process right to be present during trial was violated when he was excluded during the post-verdict questioning of a juror by the court concerning Rivera's allegations of bias. The alleged bias stems from Rivera's belief that he and the juror in question knew each other socially in Greenwich Village for a period of over ten years from the 1970s to 1980s.

On May 9, 1994, the jury returned a guilty verdict against Rivera for his role in the heroin distribution conspiracy. Subsequently, on May 11, 1994, Rivera pled guilty under federal forfeiture provisions to obtaining property constituted and derived from the proceeds of the drug business. On that same date, Rivera informed the court for the first time that he claimed to know one of the jurors. Rivera stated that he first became aware of this knowledge before the jury went into deliberation, but that he did not raise the issue at that time because he was having difficulty communicating with his appointed counsel. We have addressed the issue of Rivera's ineffective assistance of counsel claims in the separately issued summary order and determined that Rivera's claims are unfounded.

The allegation of juror bias was raised by Rivera during a conference in the Judge's robing room. According to Rivera, he and the juror went out together almost every weekend to discuss over a period of approximately ten years. Both of then

also belonged to gangs that occasionally rivaled. To further support his allegation, Rivera named a member of the juror's former group, who had been close friends with the juror, and who testified against Rivera in a prior state court case. Rivera also recounted that, in an unrelated incident, a member of another gang was stabbed during an altercation with the juror's gang. That gang member was a co-defendant in this case.

Rivera concludes that, based on the described interaction, it is not possible that the juror could not have realized who he was, and that it is impossible for the juror to disavow knowledge about the certain other named characters they had known in the past, and the one who figured in this case. For these reasons, Rivera asserts that the juror was less than candid with the court during voir dire.

Likely concerned that Rivera's presence might be intimidating, the judge then asked Rivera to leave the robing room while she questioned the juror. Rivera left without making his own objection and without objection by his counsel, who remained in the room throughout the ensuing questioning.

The court questioned the juror and found that the bias allegation was baseless. Though some of the juror's responses were vague, when asked whether he recognized Rivera, the juror responded, "No, I would have said something if I knew." Rivera's counsel contributed to the questioning. The district court denied Rivera's application to interview the juror more fully or to hire a private investigator to investigate the alleged prior relationship between Rivera and the juror.

On appeal, Rivera argues that the court's questioning of the juror in camera deprived him of his Fifth Amendment right of due process. The government argues that by failing to object, Rivera and his counsel waived Rivera's right to be present during the questioning of the juror.

Due process requires that a defendant be present at all stages of the trial "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Snyder v. Massachusetts, 291 U.S. 97, 108 (1934); Accord Kentucky v. Stincer, 482 U.S. 730, 745 (1987); United States v. Rivera, 22 F.3d 430, 438 (2d Cir. 1994); United States v. Fontanez, 878 F.2d 33, 35 (2d Cir. 1989).

This right is codified in Rule 43 of the Federal Rules of Criminal Procedure which provides that a defendant, unless voluntarily absent, shall be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." See Fed. R. Crim. P. 43; United States v. Reiter, 897 F.2d 639, 642 (2d Cir. 1990).

The "touchstone of due process analysis . . . is the fairness of the trial." Smith v. Phillips, 455 U.S. 209, 219 (1982) (discussing fairness where prosecutorial misconduct was alleged). We assume without deciding (as the government appears to concede) that Rivera's right to be present extended to the post-verdict stage after the jury had already been dismissed. We have previously held that "courts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences." United States v. Sun Myung Noon, 718 F.2d 1210, 1234 (2d Cir. 1983). "This is to avoid harassment of jurors, inhibition of deliberation in the jury room, a deluge of post-verdict applications mostly without merit, [ ] an increase in opportunities for jury tampering . . . [and] to prevent jury verdicts from being made more uncertain." King v. Untied States, 576 F.2d 432, 438 (2nd Cir. 1978) (citing United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961)). As we explained in United States v. Moten, 582 F.2d 654 (2d Cir. 1978), a trial court is required to hold a post-trial interrogation only when reasonable grounds for investigation

exist. Id at 666-67. Reasonable grounds are present when there is "clear," "strong" and "incontrovertible"evidence. King, 576 F.2d at 438 (quoting United States v. Dioguardi, 492 F.2d 70, 78, 79, 80 (2d Cir. 1974)).

It is well established that a defendant may waive his right to be present at any time during trial if his waiver is knowing and voluntary. Reiter, 897 F.2d at 642. Rule 43 (b) (1) of the Federal Rules of Criminal procedure states that the continued presence of the defendant is not required when the defendant voluntarily absents himself. We find that Rivera waived his right to be present during the questioning of the juror. The record is plain on its face. Neither Rivera or his counsel made any objection to the court's request for Rivera to excuse himself so that the juror might be questioned. The Supreme Court has held that "failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 at a conference which he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right." United States v. Gagnon, 470 U.S. 522, 529 (1985) (per curiam).

In addition, Rivera's counsel remained present and was active during the entire questioning. Due process does not assure "privilege of presence when presence would be useless, or the benefit but a shadow.: Snyder, 291 U.S. at 106-07. Rivera's exclusion from the interview did not impair his counsel's ability to represent him. Though Rivera claims that, had he been present, he could have assisted his counsel in exposing the falseness of the juror's answers, the juror was questioned on every significant point Rivera relayed to the court. Furthermore, this Court has explained that a district court may address a juror outside the presence of all the parties to a criminal trial "when questioning of the juror before others

might have a chilling or embarrassing effect on the juror." United States v. Aiello, 771 F.2d 621, 629 (2d Cir. 1985).

Accordingly, we hold that Rivera's due process rights were not infringed because he waived his right to be present while the juror was questioned.

Regarding the scope of the district court's inquiry, a trial judge is vested with very broad discretion to deal with problems that arise in connection with jury deliberations or a juror's fitness to deliberate. Aiello, 771 F.2d at 629. The decision to investigate jury misconduct allegations rests within the sound discretion of the district court. United States v. Conover, 772 F.2d 765, 770 (11th Cir. 1985), aff'd in part and remanded on other grounds sub nom. Tanner v. United States, 483 U.S. 107 (1987).

The "reasonable grounds" standard also applied to ascertain whether the scope of a hearing that has been held is adequate. "[W]hen . . . it becomes apparent that the . . . reasonable grounds to suspect prejudicial jury impropriety do not exist, the inquiry should end." Sun Myung Moon, 718 F.2d at 1234.

In determining whether to hold an investigative hearing, and its extent, the trial judge "will necessarily be directed by . . . the credibility of the source." United States v. Bradshaw, 787 F.2d 1385, 1389 (10th Cir. 1986). Accord United States v. Hendrix, 549 F.2d 1225, 1227-28 (9th Cir. 1977); United States v. Eubanks, 591 F.2d 513, 516 (9th Cir. 1979). The court suggested that given the specificity of Rivera's recollection of the extended prior association he alleges -- if true -- it is incredible that Rivera did not recognize the juror earlier "in light of the length of the trial and Rivera's self-professed prior close association with [the juror]." Whether Rivera himself was less than candid at some earlier stage in the trial by not admitting he knew the juror, or whether the allegation was wholly fabricated, the court could properly consider the

circumstances and the timing o f the allegation when determining how far to take the investigation. Furthermore, as noted, Rivera admits that he first became aware of this knowledge before the jury went into deliberation. We have this knowledge before the jury went into deliberation. We have previously held that waiver will b found where a defendant knew of a "prejudicial outside influence before the jury finished deliberating, 'but [ ] nevertheless stood mute, gambling on an acquittal while holding [the] issue in reserve.' " Moten, 582 F.2d at 667 (citing United States v. Gersh, 328 F.2d 460, 463 (2nd Cir. 1964).

Moreover, the jury was thoroughly questioned by the court and while some of his responses were ambiguous at first, he did reply to direct questioning by the court that he would have stated that he recognized Rivera if that were the case. As the court noted "[a]bsent evidence to the contrary, we presume that jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court." United States v. Easter, 981 F.2d 1549, 1553 (10th Cir. 1992) (citing United States v. Greschner, 802 F.2d 373, 381 (10th Cir. 1986)). The court noted that the only indication in the record that the juror knew or recognized Rivera was Rivera's "naked assertions."

Under the circumstances, we find that the district court's scope of inquiry, and determination that there was no bias on the part of the accused juror, was proper.

C. Vacatur of a Defendant's Conviction Required by Supreme Court Holding in Baily v. United States.

Appellant Jose Colon was convicted for using and carrying a firearm during and in relation to narcotics trafficking, in violation of 19 U.S.C. Sec. 924 (c). The government concedes, and we hold, that in light of the Supreme Court's decision in Baily v. United States, 116 S. Ct. 501 (1995), the conviction must be vacated.

The principal evidence at trial relating to the count included the testimony of the detective who searched Colon's residence at the time of the arrest and recovered two firearms from a bedroom closet, and two firearms in the garage located on the ground floor of the apartment building. An accomplice -witness also testified that Colon had given him a gun for delivery to a co-defendant. The same accomplice-witness testified that on another occasion, he also purchased a gun for Colon at his request, which another co-defendant then advised Colon to hide in his garage. However, none of the testimony linked the guns discussed by the accomplice-witness with the guns that were recovered. The accomplice-witness also testified that he had never seen Colon carry or use a firearm in connection with his narcotic business.

Bailey, which was decided by the Supreme Court on December 6, 1995, holds that the "use" prong of Section 924 (c) must be proved by evidence sufficient to show an "active employment of the firearm by the defendant." Baily, 116 S. Ct. at 505 (emphasis in original). The Court held that a gun cannot be "used" within the meaning of Section 924 (c) merely on the basis that the gun's undisclosed presence emboldens or protects its owner, or on the basis that the gun is stored near drugs or drug proceeds for the purpose of protecting narcotic trafficking. Id. at 508.

This marks a dramatic reversal of prior law in this Circuit, which had held that "possession of a gun under circumstances where the weapon is so placed as to be an integral part of the offense" was sufficient to establish "use." See, e.g., United States v. Meggett, 875 F.2d 24, 29 (2d Cir. 1989).

Accordingly, Colon's conviction on the Section 924 (c) charge must be vacated and his case remanded for (1) resentencing on the two remaining narcotics counts on which he was convicted; (2) consideration of whether to impose the

two-level enhancement authorized under Section 2D1.1 (b) (1) of the United States Sentencing Guideline for Colon's possession of firearms; and (3) return of the $50 special assessment fee imposed on this count.

D. Vacatur of a Defendant's Conviction Required by Supreme Court Holding in Rutledge v. United States.

Appellant Ralph Rivera was convicted on a count of narcotics conspiracy,and a count which charged Rivera with engaged in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. Section 848 (a), among other counts. In sentencing Rivera, the district court entered a written judgment on both counts, but pronounced a single sentence of life imprisonment, thus following the prevailing practice in this Circuit at the time, which wa to allow the two separate convictions to stand--even though the conspiracy count was acknowledged to be a lesser-included offense of the CCE conviction- but to combine them for purposes of sentencing so that only one sentence, on the CCE count, would be imposed.

The government concedes, and we hold, that in light of the Supreme Court's decision in Rutledge v. United States, 116 S. Ct. 1241 (1996), Rivera's convictions for both the narcotics conspiracy and the CCE offense cannot stand, and that one count of conviction must bee vacated.

In Rutledge, the Supreme Court expressly disapproved of the practice followed by courts in this Circuit. Rutledge held that a narcotics conspiracy chargee is a lesser-included offense of a charge of engaging in a CCE, but entry of a judgment on both a CCE count and a conspiracy count "amounts to cumulative punishment not authorized by Congress." Rutledge, 116 S. Ct. at 1248. The Court noted that, if nothing else, entry of judgment on both convictions resulted in the assessment of an extra $50 special assessment. Id. The Court specifically disapproved of the "second Circuit's practice in entering

concurrent judgments,: id at 1250, and held in that case that " '[o]ne of [the defendant's] convictions . . . is unauthorized punishment for a separate offense" and must be vacated," id. at 1250-51 (quoting Ball v. United States,470 U.S. 856, 864 (1985)). Thus, Rutledge requires that only one of Rivera's convictions be vacated, along with the $50 special assessment that was imposed on it.

Rivera's assertion that the forfeiture count to which he pled guilty should also be vacated because his narcotics conviction was vacated on appeal misinterprets the holding in Rutledge. Regarding of which conviction is vacated, the forfeiture conviction stands because the criminal forfeiture statute at issue, 21 U.S.C. Sec. 853 (a), expressly authorizes the forfeiture of property derived from or used to facilitate any violation of Title 21.

Accordingly, e vacate Rivera's conviction on the lesser-included offense count of conspiracy to distribute narcotics, and remand for return of the $50 special assessment that was imposed on it.

III. CONCLUSION

All other convictions not addressed herein are affirmed.